Supreme Court, U.S.
FILED
AUG 27 1997
CLERK

No. 97-187

IN THE

Supreme Court of the United States

October Term, 1997

SANDRA S. NELSON,

Petitioner,

v.

McCLATCHY NEWSPAPERS, INC.,
and TACOMA NEWS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON SUPREME COURT

BRIEF OF AMICUS CURIAE THE NEWSPAPER GUILD-CWA, IN SUPPORT OF PETITIONER

BARBARA L. CAMENS
General Counsel
The Newspaper Guild-CWA

Barr, Peer & Camens
1620 I Street N.W., Suite 603
Washington, D.C. 20006
(202) 223-1900
August 27, 1997

aBCD Legal Printers, Seattle, Washington

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

ARGUMENT 1

I. THE FIRST AMENDMENT DOES NOT PROHIBIT STATE COURTS FROM ENFORCING ANTIDISCRIMINATION STATUTES IN FAVOR OF NEWSPAPER EMPLOYEES 1

A. Employers should not be granted a privilege to engage in invidious discrimination 3

B. The First Amendment does not grant newspapers the right to control the off-duty activities of reporters 5

C. The Washington Supreme Court failed to consider the fundamental right of which Ms. Nelson was deprived 8

D. The Constitutional privilege created by the Washington Supreme Court is without rational limit 13

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Associated Press v. N.L.R.B., 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953 (1937) 7

Bollenbach v. Board of Education, 659 F. Supp. 1450 (S.D. N.Y. 1987) 16

Cammermeyer v. Aspin, 850 F. Supp. 910 (W.D. Wash. 1994), *citing Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984).....4

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) 4

Cohen v. Cowles Media Co., 501 U.S. 663, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991) 7

Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981) 15

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979) 9

Kramer v. Union Free Sch. District No. 15, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969) 9

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974) 6

Nelson v. McClatchey Newspapers, Inc., 131 Wn.2d 523, 936 P.2d 1123 (1997) 2,3,5,12,13

Palmore v. Sidoti, 466 U.S. 429, 433, 104 S.Ct. 1879, 1882, 80 L.Ed.2d 421, 426 (1984) 4

Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) 8

Romer v. Evans, ___ U.S. ___, 116 S.Ct. 1620 (1996) 9

Rucker v. Higher Education Aids Board, 669 F.2d 1179 (7th Cir. 1982) 16

United States v. Carolene Products Co., 304 U.S. 144 (1938) 10

Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964) 8

MISCELLANEOUS

Comment, *The Reporter As Citizen: Newspaper Ethics and Constitutional Values*, 141 U. Pa.L.Rev. 221, 235-36 (1992) 13,14

Ely, *Democracy and District 87* (1980 11

Gene Goodwin and Ron F. Smith, *Groping for Ethics in Journalism*, Iowa State U. Press, Ch. 4 (1993) 14

Maltby & Dushman, *Whose Life Is It Anyway--Employer Control of Off-Duty Behavior*, 13 St. Louis U. Pub.L.Rev. 645,646 (1994) 17

Amicus The Newspaper Guild-CWA submits this Brief in support of Petitioner Sandra S. Nelson's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case set forth in Petitioner's Petition for Writ of Certiorari.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT PROHIBIT STATE COURTS FROM ENFORCING ANTIDISCRIMINATION STATUTES IN FAVOR OF NEWSPAPER EMPLOYEES.

A majority of the Washington Supreme Court ruled that because Respondent is a newspaper company, it may impose a broad prohibition on the political speech and activity of Ms. Nelson, one of its employees. Respondent has no complaints about Ms. Nelson's job performance, or about any of her on-duty conduct or speech. Nor does Respondent allege that Ms. Nelson

has in any way associated her employer with her off-duty activities, or implied that her employer endorses or approves those activities. Rather, Ms. Nelson has been disciplined because of her participation, on her own time and in locations far removed from her workplace, in an abortion rights demonstration and in a local gay and lesbian rights initiative campaign. As the employer frankly concedes, Ms. Nelson was told that "her transfer was permanent, unless she would promise to refrain from engaging in political activities." *Nelson v. McClatchey Newspapers, Inc.*, 131 Wn.2d 523, 528, 936 P.2d 1123 (1997).

In short, this case does not involve an employer's right to control the job performance or the workplace conduct of its employees. Nor does this case involve a newspaper company's right to control the content of its publication. Rather, this case involves the employer's

right to control the employee's political activity twenty-four hours a day, three hundred sixty-five days a year.

A. Employers should not be granted a privilege to engage in invidious discrimination.

The Washington Supreme Court held that a Washington statute prohibits employers from restricting the political activity of employees, and that Respondent violated this statute. *Nelson*, 131 Wn.2d at 534. However, a majority of the court concluded that the statute could not be applied to a newspaper, because the First Amendment guarantees to a newspaper unrestricted freedom to exclude from employment any person whose off-duty conduct potentially jeopardizes its "credibility" by tarnishing its "appearance of objectivity." *Id.* at 527.

This ruling allows a newspaper employer to punish a reporter who engages in public conduct that might, in the opinion of the newspaper, cause readers to

lose confidence in the objectivity of that reporter's work. This ruling permits newspapers to choose to discriminate against any class of persons.

Amicus fears that in attempting to discern the "confidence level" of their readership, newspapers are likely to reinforce community values that are based on fear, hatred and prejudice. *See Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S.Ct. 1879, 1882, 80 L.Ed.2d 421, 426 (1984)("private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313, 320 (1985); *Cammermeyer v. Aspin*, 850 F. Supp. 910, 917 (W.D. Wash. 1994)(Colonel's discharge from the National Guard because of her status as a homosexual was "based solely on prejudice"). It is this sort of prejudice that led to Respondents' discipline

of Ms. Nelson, an exceptional newsreporter who happens to be a homosexual.

The Washington Supreme Court's ruling grants constitutional protection to Respondents' prejudices, and to the perceived prejudices of Respondents' readers.

B. A newspaper does not have a constitutional right to control the off-duty activities of reporters, unless those activities have more than an incidental effect on the newspaper's ability to report the news.

"No one has alleged that Ms. Nelson's reporting was influenced in any way by her political views." *Nelson*, 131 Wn.2d at 544-545 (Dolliver, J., dissenting).[1] "Nor has anyone alleged that application of the statute would impinge upon the newspaper's exclusive right to determine what to print." *Id.*

---

[1] Respondents have argued that Ms. Nelson's bias is so subtle and insidious that it cannot be detected. This position conflicts with the argument that Ms. Nelson's bias alters the content of the newspaper.

Nevertheless, relying on *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), a majority of the Washington Supreme Court held that Respondents have an absolute right to decide who may work as a reporter at the paper.

The Washington court's ruling is contrary to this Court's precedent. In *Miami Herald*, this Court struck down a statute that granted a political candidate a right to equal space to reply to criticism by a newspaper, reasoning that the First Amendment prevents the state from dictating the content of a newspaper. 418 U.S. at 255-56. Since then, this Court has clarified that although the state may not dictate the *content* of a newspaper, "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to

gather and report the news." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991); *see Associated Press v. N.L.R.B.*, 301 U.S. 103, 131, 57 S.Ct. 650, 81 L.Ed. 953 (1937) (rejecting the argument that a newspaper "must have absolute and unrestricted freedom to employ and to discharge those who . . . edit the news, that there must not be the slightest opportunity for any bias . . . .").[2]

Respondent has not demonstrated that enforcement of the Washington statute would have *any* effect on its ability to gather and report the news. Unless there is more than an *incidental* effect, under this Court's precedent, the Washington courts may enforce the Washington statute, without offending the First

---

[2] The majority in *Nelson* disparaged *Associated Press*, reasoning that this Court decided that case five justices to four, for reasons that were politically motivated. 131 Wn.2d at 541-542.

Amendment. This Court should grant certiorari to clarify the scope of its earlier cases.

C. The Washington Supreme Court failed to consider the importance of Ms. Nelson's right to participate in the political process.

In focusing on the First Amendment right of the newspaper, the Washington Supreme Court failed to consider the importance of Ms. Nelson's right to participate in the political process. This Court has consistently emphasized that the right to participate in the political process is the guardian of all other rights. "[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights[.]" *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964). "[F]or reasons

too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979). *See also Romer v. Evans*, ___ U.S. ___, 116 S.Ct. 1620, 1626 (1996) (striking down a law that "bars homosexuals from securing protection against the injuries that these public-accommodations laws address"); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 628, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969) ("The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people").

Conversely, this Court recognized nearly sixty years ago that prejudice against "discrete and insular minorities" may "tend[] seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities[.]" *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53, n.4 (1938). These cases emphasize the paramount duty of courts to ensure the access of all persons, on an equal basis, to the political process by which they can defend their own rights and interests.

This lesson finds additional support in the text and history of the Constitution itself. As Professor Ely points out, the text of the Constitution reveals that "the selection and accommodation of substantive values is left almost entirely to the political process and instead the document is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of

individual disputes (process writ small), and on the other, with what might capaciously be designated process writ large -- with ensuring broad participation in the processes and distributions of government." Ely, *Democracy and District 87* (1980) (footnotes omitted). Similarly, of the eleven constitutional amendments enacted since 1870, five (the Seventeenth, Nineteenth, Twenty-Third, Twenty-Fourth and Twenty-Sixth) have extended the right to vote. "Extension of the franchise to groups previously excluded has therefore been the dominant theme of our constitutional development since the Fourteenth Amendment," pursuing "the achievement of a political process open to all on an equal basis." *Id.* at 99.

The Washington Supreme Court would allow Ms. Nelson's employer to deprive her of her fundamental right to participate in the political process.

Under the *Nelson* ruling, the right to participate in the political process can be denied to people who work for newspapers. If left standing, this ruling could leave an entire profession without a political voice. The Washington Supreme Court's ruling undercuts this Court's numerous holdings on the importance of the right to participate in the political process.[3]

---

[3] The Washington Supreme Court majority pointed out that this Court "has recently set the pace in stressing the importance of vigorously protecting free speech within our system." *Nelson*, 131 Wn.2d at 537. The court noted numerous free speech cases that have been handed down by this Court. *Id.* at 537 n. 11. A majority of the Washington Supreme Court seems to have confused "freedom of speech" with freedom "of the press." No one has suggested that Respondent's disciplinary actions against Ms. Nelson amount to "speech." Clearly, the majority's ruling has the effect of enhancing Respondent's freedom of the press, while restricting Ms. Nelson's freedom of speech.

D. The Constitutional privilege created by the Washington Supreme Court is without rational limit.

A majority of the Washington Supreme Court held that the newspaper's policy restricting Ms. Nelson's off-duty political activity was within the newspaper's "constitutionally protected sphere of control of editorial integrity and credibility." *Nelson*, 131 Wn.2d at 542. Amicus suggests that this "sphere" is impermissibly vast.

Other newspapers have demonstrated the vast scope of such policies. In July 1989, the *Vero Beach Press-Journal* fired an education reporter for publicly endorsing abortion rights, although the reporter had affirmatively sought to ensure that she would not be assigned to cover abortion-related issues. Comment, *The Reporter As Citizen: Newspaper Ethics and Constitutional Values*, 141 U.Pa.L.Rev. 221, 235-36

(1992). The *Troy Times Record* dismissed a reporter who had been selected as an alternate delegate to the 1980 Democratic National Convention, although she never covered politics. *Id.* at 237-38. An Associated Press reporter who was a born-again Christian was taken off a state government beat after he expressed his religious views in an interview with a Christian newspaper. *Id.* at 253, n.149. The *Philadelphia Inquirer* found a violation of its "ethics code" when a film critic signed a petition protesting the deteriorated condition of a theater.[4] *Id.* at 238. Under the Washington Supreme Court's ruling, newspapers would have a constitutional privilege to restrict employee political activities in all of these situations.

---

[4] Such ethics codes are not standard in the industry. In fact, these codes are the subject of much debate. *E.g.*, Gene Goodwin and Ron F. Smith, *Groping for Ethics in Journalism*, Iowa State U. Press, Ch. 4 (1993).

The Washington Supreme Court granted to the News Tribune the right to base its personnel decisions on the hypothetical irrational reactions of some of its customers.[5] This is similar to an employer's desire not to hire a person of a certain sex, race, or religion, based on the assumption that its customers will react negatively to such a person. Attempts to justify hiring decisions on this basis have been uniformly rejected. *See, e.g., Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981) (employer may not refuse to hire female on the ground that South American customers may refuse to deal with her); *Rucker v. Higher Education Aids Board*, 669 F.2d 1179, 1181 (7th Cir. 1982) (employer may not refuse to hire white person on the ground that predominantly Black clientele

---

[5] It is worth stressing that adverse reaction of Respondents' readers is purely hypothetical. Respondents have produced no complaints about Ms. Nelson's work, or about her political activity.

would allegedly prefer to deal with a Black person); *Bollenbach v. Board of Education*, 659 F. Supp. 1450, 1472 (S.D. N.Y. 1987) (employer may not refuse to assign female bus drivers to route serving all-male religious school, although "Hasidic clientele strongly prefer male drivers").

The Washington Supreme Court has granted to newspapers a limitless constitutional privilege to control the private lives of their employees. This court should review this broad ruling.

CONCLUSION

> Between the hours of nine and five, the average person's life is not her own. Her employer can tell her what to do, and when and how to do it. Employers do not have to be polite, or fair. Even one's rights as an American citizen largely disappear when one goes through the office door. This situation is tolerable because it is limited to working hours. Few would want to live in a society in which they were subjected to employer control twenty-four hours a day.

Maltby & Dushman, *Whose Life Is It Anyway--Employer Control of Off-Duty Behavior*, 13 St. Louis U. Pub.L.Rev. 645, 646 (1994)(footnotes omitted). A majority of the Washington Supreme Court would have reporters live in such a society. Amicus The Newspaper Guild-CWA suggests that this result is detrimental to newspaper workers, and is contrary to this Court's rulings on the First Amendment and on the right to political participation. Amicus respectfully requests that this Court grant certiorari.

Respectfully submitted this 27th day of August, 1997.

The Newspaper Guild-CWA

By: BARBARA L. CAMENS